

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CORAL HARBOR REHABILITATION	:	
AND NURSING CENTER, Petitioner and	:	
Cross-Respondent,	:	
	:	
v.	:	Case Nos.
	:	18-2220 and 18-2619
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent and Cross-Petitioner.	:	

REPLY BRIEF OF PETITIONER CORAL HARBOR
REHABILITATION AND NURSING CENTER

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DATE: October 31, 2018

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ARGUMENT IN REPLY:

I. The Board’s Decision is not based on the rationales advanced in its Answering Brief or the Union’s.

As this Court explained in NLRB v. New Vista Nursing & Rehabilitation, 870 F.3d 113, 133 FN12 (3rd Cir. 2017) (“New Vista”), the Board may not present in its briefs to this Court rationales for its decision based on caselaw that is not reflected in that decision and should have been considered below. In New Vista at 133 FN12, this Court found that where, as here, the Board’s decision relies on reasoning that this Court previously held unreasonable, that decision cannot be defended with post-hoc reasoning from other caselaw, citing ICC v. Bhd. of Locomotive Eng’rs., 482 U.S. 270, 283, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987) (“[A] court...may not affirm on a basis containing any element of discretion – including discretion to...interpret statutory ambiguities – this is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court.”).

The Answering Briefs of both the Board and the Union present arguments and rationales not reflected in the Board’s decision and are based on caselaw arguments not cited by or reflected in the analysis in either the Board decision or those parts of the Administrative Law Judge’s decision adopted by the Board. Here, as found in New Vista at 135 FN14, the Board does not request deference to their reading of the statute or point to a new interpretation of the NLRA in its

decision below which was issued after this Court's controlling precedent was confirmed in New Vista. While Coral Harbor raised this issue in its opening brief, at page 29, neither the Board nor the Union have shown otherwise.

The Board's Answering Brief, at page 22, relies on and cites to, as "settled Board law", a 1996 decision, Ten Broeck Commons, 320 NLRB 806 (1996)¹, for the position that the "effectively recommend discipline" criteria for supervisor status requires a showing that putative supervisors submit actual recommendations that are regularly followed and result in personnel action without independent investigation by others. Ten Broeck Commons was decided prior to this Court's precedent in NLRB v. Attleboro Associates, Ltd., 176 F.3d 154 (3rd Cir. 1999), which was relied on in New Vista; and, the Board's Brief does not ever cite or distinguish the Attleboro precedent or this Court's rejection in Attleboro of the Board's prior positions.

The ALJ's Decision at 366 NLRB No. 75, page 20 (JA 21), cites Ten Broeck Commons in support of his conclusion that Coral Harbor failed to meet its burden of establishing the LPNs' statutory supervisor status to effectively recommend discipline. The Board adopted that basis in its Decision at page 1 (JA 3), without any recognition of this Court's rejection of that basis in Attleboro:

¹ The Board's Decision Website and Decisions in this case state this name for Decision; however, in the Board's Brief it is stated as "Ten Brock Commons."

“Specifically, we affirm the judge’s finding, for the reasons stated in his decision, that the Respondent failed to establish that the LPNs have the supervisory authority to discipline or effectively recommend discipline.”

In New Vista at 131, this Court noted:

Attleboro rejected the Board’s position that an employee does not have authority to effectively recommend discipline if the employee’s supervisors independently investigate the employee’s recommendation. Similar to this case, in *Attleboro*, the Board argued: “[T]o be supervisory, the actions taken ‘must not only initiate, or be considered in determining future disciplinary action, but also . . . must be the basis for later personnel action without independent investigation or review by superiors.’”

Since this Court has already rejected the rationale reflected in Ten Broeck Commons, New Vista at 133, Coral Harbor submits that the issues in this case are restricted to the Board’s conclusions and findings at FN6 of its Decision (JA 3-4) that the result would be the same under New Vista and Attleboro. The Union’s Brief, at FN5, appears to agree that the New Vista standards are controlling in this case (“Because the Court will review the Board’s order under Third Circuit law, we apply only that [New Vista] standard.”).

II. The LPNs’ Authority to Effectively Recommend Discipline Meets the Tests in “New Vista”

The Board’s Brief, at page 36, agrees that the NLRA, “by its terms, focuses on what workers are authorized to do, not what they are called.” The Board’s Brief demonstrates that the Board’s conclusion that Coral Harbor’s LPNs lack such authority is based on Board standards previously rejected by this Court. By

applying the wrong standards and caselaw neither cited nor relied on by the Board in the underlying decision, the Board's Brief, at page 22, downgrades the LPNs authority from supervisory to "mere reportorial authority" in which it is "higher ups" who made the disciplinary decisions.

A. Neither the Board nor the Union Address All Tests in "New Vista"

In New Vista at 132, this Court stated:

Although *Attleboro* repeatedly points out that the progressive disciplinary process employed in that case could ultimately lead to termination, it is clear that a nurse can be a statutory supervisor if he or she has the authority to effectively recommend less onerous discipline. For instance in *Warner Co. v. NLRB*, we held that "sending a[n employee] home is discipline"—as was "cal[ing] the plant manager's attention to instances of . . . violations of the work rules." 365 F.2d 435, 439 (3d Cir. 1966). This is also implicit in the statutory text because 29 U.S.C. § 152(11) states, among other things, that a supervisor can "hire, transfer, suspend, lay off, . . . discharge, . . . or discipline other employees." Were "discipline" the same as "lay[ing] off" or discharg[ing]," the word "discipline" would have been mere surplusage.

Neither the Union's Brief, at pages 29-31, nor the Board's, addresses this Court's clarification that statutory supervisor status can be found from instances of effectively recommending less onerous discipline and from instances of calling a manager's attention to instances of violations of work rules. Their Briefs thereby fail to rebut Coral Harbor's Brief's arguments, at pages 26 and 43, that the record in this case supports that Coral Harbor's LPNs had the authority to and did just that.

Both the Board's Brief at page 13 and the Union's at page 11 agree that the Record shows that the disciplines imposed on Vera Gray were the result of LPN Bernard calling her Unit Manager's attention to violations of work rules. The Board's Brief at page 14 agrees that the Record shows that LPN Tursi initiated a discipline issued to CNA Bartee by letting the DON know that she, LPN Tursi, would be issuing a discipline to Ms. Bartee for violating work rules related to resident smoking and confirming with DON that LPN Tursi could write up the CNA, then wrote it up, after which the DON determined the level of discipline. The ALJ expressly found, JA22, that the "LPNs clearly report instances of misconduct and poor performance and have, on some occasions, specifically recommended that discipline be imposed." The Board, JA03-04, did not disagree.

The Board's Brief at page 13 and the Union's at page 11 arguing that joint action by LPNs Tursi and Champion to provide training for CNAs they found performing below expectations does not qualify as "independent judgment" is inconsistent with the standards in New Vista because LPN Tursi's un rebutted testimony is that they chose to do training instead of writing up the CNAs (JA000467-468). New Vista at 132 citing Attleboro at 165 ("has discretion to take different actions, including verbally counseling the misbehaving employee...."). The Board's and Union's Briefs thereby fail to rebut Coral Harbor's Brief's arguments, at pages 46-47, that the Board applied the wrong legal standards below.

B. The Union Misstates Part of the Test in “New Vista”

This Court should reject the attempt in the Union’s Brief, at 29-31, to amend New Vista’s legal standards with caselaw the Board did not rely on below. The Union’s Brief at page 30 FN9 takes issue with Coral Harbor’s Brief’s reliance, at pages 46-47, on GGNSC Springfield LLC v. NLRB, 721 F.3d 403, 410-411 (6th Cir. 2013) and In re Progressive Transportation Services, Inc., 340 NLRB No. 126 at 1046 (2003) dealing with the part of the “New Vista” tests, New Vista at 132 citing Attleboro at 165 (“could lead to her termination”). The Union’s Brief misstates the import of these case and thereby fails to rebut Coral Harbor’s point. In the cited Board Decision noted as the underlying source of the principle that to find “discipline” it must have “a real potential to lead to an impact on employment,” the Board rejected the Union’s approach (and the arguments in the Board’s Brief here) as inconsistent with industrial practicality:

Our colleague suggests that authority as to discipline is supervisory only when it automatically leads to an action affecting employment. We disagree. As discussed above, the cases do not so hold. Further, the argument does not comport with industrial practicality. If our colleague were correct, the imposition of discipline would be supervisory only if there is a rigid and inflexible system under which discipline always leads to a precise impact on employment. In our view, it is sufficient that the discipline has the real potential to lead to an impact on employment.

This Court’s standards in New Vista, as argued in Coral Harbor’s Brief at 46-47, citing the same cases as in the Union’s FN9, are consistent with this “industrial practicality” approach; and, should be followed in this case.

The Board's Brief, at 29, agrees that the Record of "disciplines" in this matter include two (2) suspensions. One of these suspensions (J01317) was imposed after a recommendation for discipline by LPN Bernard (JA000669-000670) and after LPN Bernard had previously imposed a "counseling" for the same individual's lateness violations followed by another disciplinary action when violations continued thereafter (JA000663). This sequence indicates that LPN disciplines had "a real potential to lead to an impact on employment" even given the short period of operations involved in this matter.

There is also no dispute in the Record that LPN Higgins recommended the termination of a CNA (JA000388), which, while not imposed due to the Administrator's determination that there was insufficient documentation to support it, further confirms that actions taken by the LPNs under their authority as statutory supervisors had "a real potential to lead to an impact on employment." It also reflects the need for "industrial practicality" in the approval of discipline where management must factor in the "just cause" burden of proof requirements imposed by the collective bargaining agreement in place here (JA000876) along with the costs and impacts on staff morale and care of the inflexible approach required by the Union and the Board in this case.

CONCLUSION

WHEREFORE, Coral Harbor requests this Honorable Court to GRANT its Petition for Review and SET ASIDE the Board's decision in these matters without remand and to DENY the Board's Petition for Enforcement.

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CERTIFICATE OF COMPLIANCE

I, Louis J. Capozzi, Jr., Esquire, hereby certify to the following:

1. This brief contains 2456 words using Microsoft Word software.
2. The text of the electronic brief is identical to the text in the paper copies.
3. A virus detection program, Sophus Endpoint Security and Control, Version 10.0, has been run on the file and that no virus was detected.
4. Opposing counsel are Filing Users as provided in L.A.R. Misc. 113.4 and have consented to electronic service of the brief through the court's electronic docketing system (CM/ECF).

I also certify herein that on this 31st DAY OF OCTOBER, 2018, I am also mailing to each of them via first class U.S. mail, postage pre-paid, a paper copy of the brief and attachments.

5. I am admitted to practice in this Court of Appeals.

By: **/s/ Louis J. Capozzi, Jr.**
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CERTIFICATE OF SERVICE

I, Louis J. Capozzi, Jr., attorney for CORAL HARBOR, hereby certify that on this date a copy of the foregoing document was served via the Court's electronic filing system to the following individuals which constitutes service on all parties or their counsel of record.

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